Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7(S4)22–321 OF 1998

MOHD HISHAMUDIN J

18 AUGUST 2000

Civil Procedure *— Affidavits — Defective affidavit — Deposed by plaintiff's solicitor — Disputed questions of fact involved — Whether for parties or their solicitors to affirm affidavits*

Civil Procedure *— Amendment — Statement of claim — Whether affidavit in support required — Argument that affidavit not required except in cases of amendment of writ issued for service out of jurisdiction — Whether plaintiff can satisfy court that amendment will not cause injustice — Rules of the High Court 1980 — O 20 r 5*

The plaintiff applied for leave to amend its statement of claim. The application was supported by an affidavit deposed by the plaintiff's solicitors. The learned senior assistant registrar rejected the affidavit and dismissed the plaintiff's application and hence the appeal. Counsel for the plaintiff relied on the case of *Holland v Leslie* [1894] 2 QB 346 and submitted that an affidavit is not required, as a rule, except in cases of amendment of a writ issued for service out of the jurisdiction.

Held, dismissing the appeal:

(1) The affidavit should not have been deposed by the plaintiff's solicitor. It should have been deposed by an appropriate officer of the plaintiff familiar with the facts. In matters where disputed questions of fact are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto (see p 300E, H); *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 and *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 followed.

(2) The case of *Holland v Leslie* does not lay down the proposition that 'an affidavit is not required, as a rule, except in cases of amendment of a writ issued for service out of jurisdiction' (see p 302G). Where a party applies to the court for leave to amend his pleading pursuant to O 20 r 5 of the Rules of the High Court 1980, he must, except in cases where the amendment is plainly and obviously trivial in nature or where there is no opposition to the application, satisfy the court that the application is in compliance with the principle as laid down by the Federal Court in *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd* [1983] 1 MLJ 213. The general principle is that the court will allow such amendments as will cause no injustice to the other parties.

Without a supporting affidavit, the plaintiff was in no position to satisfy the court that the conditions as laid down by the Federal Court had been satisfied (see p 301D–F).

(3) There has been a long delay of about two years in applying for the amendment. Where there has been a long delay in applying for leave to amend a pleading, there must be an affidavit to explain the delay. Only if there is an explanation by way of an affidavit will the court be in a position to assess and decide whether in the circumstances leave to amend ought to be granted or not (see p 304G–H).

[**Bahasa Malaysia summary**

Plaintif telah memohon untuk kebenaran meminda pernyataan tuntutannya. Permohonan tersebut disokong oleh suatu afidavit yang dideposkan oleh peguamcara plaintif. Penolong kanan pendaftar yang arif telah menolak afidavit tersebut dan menolak permohonan plaintif, justeru itu rayuan ini dikemukakan. Peguam plaintif bergantung kepada kes *Holland v Leslie* [1894] 2 QB 346 dan berhujah bahawa sebagai suatu peraturan suatu afidavit tidak diperlukan, melainkan dalam kes pindaan writ yang dikeluarkan untuk penyampaian di luar bidang kuasa.

Diputuskan, menolak rayuan tersebut:

(1) Afidavit tersebut tidak seharusnya dideposkan oleh peguamcara plaintif. Ia seharusnya dideposkan oleh seorang pegawai plaintif yang berkenaan yang tahu betul akan fakta-fakta kes. Dalam perkara berkenaan persoalan fakta yang dipertikaikan, adalah untuk pihak-pihak dan bukan peguamcara mereka untuk mengesahkan afidavit yang berhubung dengan perkara tersebut (lihat ms 300E, H); *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 dan *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 diikut.

(2) Kes *Holland v Leslie* tidak menetapkan prinsip bahawa 'sebagai suatu peraturan, suatu afidavit tidak diperlukan, melainkan dalam kes pindaan writ yang dikeluarkan untuk penyampaian di luar bidang kuasa' (lihat ms 302G). Di mana suatu pihak memohon kepada mahkamah untuk kebenaran meminda plidingnya menurut A 20 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980, beliau mestilah, melainkan dalam kes-kes di mana pindaan jelas adalah tidak begitu penting atau di mana tidak terdapat bantahan terhadap permohonan itu, memuaskan mahkamah bahawa permohonan tersebut mematuhi prinsip seperti yang ditetapkan oleh Mahkamah Persekutuan dalam *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd* [1983] 1 MLJ 213. Prinsip am ialah bahawa mahkamah akan membenarkan pindaan sedemikian andainya ia tidak memudaratkan pihak-pihak lain. Tanpa suatu

afidavit menyokong, plaintif tidak berada dalam kedudukan untuk memuaskan mahkamah bahawa syarat-syarat seperti yang ditetapkan oleh Mahkamah Persekutuan telah dipenuhi (lihat ms 301D–F).

(3) Terdapat kelewatan selama dua tahun dalam permohonan untuk pindaan. Di mana telah berlakunya kelewatan yang melampau dalam memohon untuk kebenaran untuk meminda suatu pliding, mestilah terdapat suatu afidavit untuk menjelaskan kelewatan tersebut. Hanya jikalau adanya penjelasan melalui afidavit maka mahkamah berada dalam kedudukan untuk menilai dan memutuskan sama ada dalam keadaan sedemikian kebenaran untuk meminda harus diberikan atau tidak (lihat ms 304G–H).]

Notes

For cases on defective affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 249–251.

For cases on amendment of statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 338–341.

Cases referred to

Bacom Enterprises Sdn Bhd v Jong Chuk & Ors [1998] 2 MLJ 301 (refd)

Conybeare v Lewis (1881) 44 LT 242 (refd)

Holland & Anor v Leslie [1894] 2 QB 346 (refd)

Ketteman & Ors v Hansel Properties Ltd [1988] 1 All ER 38 (refd)

Lembaga Pelabuhan Johor v The Pacific Bank Bhd [1998] 5 MLJ 323 (refd)

Majlis Amanah Rakyat (MARA) v Tam Seek Hong & Ors [1994] 2 AMR 1296 (refd)

Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315 (folld)

Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348 (folld)

Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor [1999] 1 MLJ 359 (refd)

Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd [1983] 1 MLJ 213 (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 5

Mahinder Singh Dulku (*Mahinder Singh Dulku & Co*) for the appellant/plaintiff.

CC Chan (*Lee Hishamudin*) for the respondent/defendant.

Mohd Hishamudin J. : Enclosure 80 is an interlocutory appeal to judge in chambers against the decision of the learned senior assistant registrar ('SAR') dismissing the plaintiff's application (at encl 67) for leave to amend the statement of claim.

The paragraph in the statement of claim intended to be amended was para 10. As it is, the paragraph reads:

> At all material times to this action, the said land was, inter alia, subject to the following encumbrances —
>
> (a) Private Caveat Jilid 22, Folio 122 dated 9 January 1995 by MPI Paper Mills Sdn Bhd;
>
> (b) Private Caveat Jilid 66, Folio 110 dated 24 October 1997 by Straw Paperboard Industries (M) Sdn Bhd; and
>
> (c) Private Caveat Jilid: Folio 186 dated 18 February 1998 lodged by Golden Skyline Sdn Bhd.

By the application to amend, the plaintiff proposed to amend the above para 10 by deleting sub-paras (b) and (c). The application was supported by an affidavit, that is, encl 68. The defendants opposed the application and had filed an affidavit in opposition, that is, encl 72.

Having heard the submissions and considered the affidavits I had dismissed the appeal with costs. I shall now state my grounds.

First, I accept the submission of the learned counsel for the respondent/defendant, En CC Chan, that the learned SAR was right in law in rejecting the affidavit of the appellant/plaintiff (affidavit of Shahidah bte Aris at encl 68) filed by the plaintiff in support of the application. The affidavit should not have been deposed by the plaintiff's solicitor. It should have been deposed by an appropriate officer of the plaintiff who is familiar with the facts.

In *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315, Shankar J (as he then was) said (at p 317):

> A second point which needs to be emphasized is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence. …

In *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348, Edgar Joseph Jr J (as he then was) said (at p 350):

> With respect, in matters where disputed questions of facts are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto (see *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315).

The learned counsel for the plaintiff, Dato' Mahinder Singh Dulku, on the other hand, urged the court to allow the affidavit to stand by citing *Majlis Amanah Rakyat (MARA) v Tam Seek Hong & Ors* [1994] 2 AMR 1296 where Abdul Malik Ishak JC (as he then was) allowed an affidavit deposed by counsel to be admissible. Although Abdul Malik Ishak JC in *Majlis Amanah Rakyat* did refer to the dicta of Shankar J in *Million Group*, the

learned judicial commissioner, however, did not refer to *Seng Huat Hang* (perhaps this case was not brought to the attention of his Lordship). In *Majlis Amanah Rakyat*, the objection (overruled by the court) by the plaintiff to the affidavit of the defendants was on the ground of hearsay, that is to say, the counsel who deposed the affidavit had no personal knowledge of the matters deposed therein, whereas in the case before me the objection is more fundamental: that a *solicitor* should not depose a contentious affidavit. With respect, where disputed questions of fact are involved, I think the better view on the issue as to whether or not a solicitor could depose an affidavit on behalf of a litigant would be that as expressed by Shankar J in *Million Group* and by Edgar Joseph Jr J in *Seng Huat Hang*. In the case before me, in the light of the contents of the defendant's affidavit, I am satisfied that there were disputed questions of facts.

Since the affidavit was rightly rejected by the learned SAR, the plaintiff's application to amend was, therefore, not supported by any affidavit.

Now, if there was no supporting affidavit, was the plaintiff then in a position to proceed with his application to seek leave of the court to amend?

The answer, I think, must be in the negative. Where a party applies to the court for leave to amend his pleading pursuant to O 20 r 5 of the Rules of the High Court 1980, he must, except in cases where the amendment is plainly and obviously trivial in nature or where there is no opposition to the application, satisfy the court that the application is in compliance with the principle as laid down by the Federal Court in *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd* [1983] 1 MLJ 213. Mohd Azmi FCJ in delivering the judgment of the court ruled (at pp 214–215):

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result: (i) whether the application is bona fide; (ii) whether the prejudice caused to the other side can be compensated by costs; and (iii) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character (see *Mallal's Supreme Court Practice* at p 342).

Without a supporting affidavit, the plaintiff in the present case was in no position to satisfy the court that the three conditions as laid down by the Federal Court had been satisfied. Thus, the application should be, and was rightly, dismissed.

Even assuming that I were to rule that the supporting affidavit of the plaintiff should be allowed to stand, it is pertinent to observe that the affidavit merely states:

> I, Shahidah bte Aris @ Mohd Haris (NRIC No 690301–10–5254) an advocate and solicitor of full age and understanding and of No 2, Lintang Sungai Ara Satu, Bayan Lepas, 11900 Penang do hereby solemnly and sincerely affirm and say as follows:
>
> (1) I am one of the solicitors having the conduct of the matter for and on behalf of the plaintiff abovenamed. I am duly authorized to affirm this affidavit on its behalf.

(2) In view of the third party proceedings initiated by the defendant, the plaintiff has informed me —
   (a) amend para 10 of the statement of claim by deleting subparas 10(b) and (c) thereof; and
   (b) make minor amendments to the other paragraphs of the statement of claim without changing the character of the suit.

(3) The purpose of the amendments is to retain the original character of the suit. The new allegations of the defendant would turn the suit into another character and therefore prolong the expeditious disposal of the suit.

(4) In view of the proposed amendments to the statement of claim I verily believe it would not be necessary for the defendant to proceed with the third party proceedings. However, the proposed amendments are not to be construed as any admission on the part of the plaintiff, of whatsoever nature, of the defendant's allegation contained in the defendant's affidavits filed in support of the application to amend the defence.

(5) I therefore respectfully pray for an order-in-terms of the application filed herein.

The affidavit thus is not only too brief and sketchy and very shallow in its content, but also does not appear to address itself fully to the fulfilment of the three conditions stipulated in *Yamaha*'s case. Indeed, it does not explain anything at all. For instance, what is the 'third party proceedings' about? In what way do the said third party proceedings necessitate an amendment to para 10 of the statement of claim? And what are the 'new allegations of the defendant'? The affidavit is, clearly, devoid of any evidential value.

Dato' Mahinder, however, submitted that a supporting affidavit is not a must in an application for leave to amend a pleading. The learned counsel referred to *The Supreme Court Practice 1995* Vol 1 (hereinafter referred to as 'the *White Book*') which states (at pp 370–1 para 20/5–8/4):

> An affidavit is not required, as a rule, except in cases of amendment of a writ issued for service out of the jurisdiction (see *Holland & Anor v Leslie* [1894] 2 QB 346 at pp 348, 450; O 11 r 4).

With respect, I am in agreement with En CC Chan that *Holland & Anor v Leslie* [1894] 2 QB 346 does not lay down the proposition that 'an affidavit is not required, as a rule, except in cases of amendment of a writ issued for service out of jurisdiction'.

In *Holland*'s case the defendant was a foreign subject residing in the United States. The plaintiff, in pursuance of leave obtained, issued a writ for service out of the jurisdiction against the defendant, and notice of the writ was in due course served upon the defendant. The plaintiff subsequently took out a summons to amend the statement of claim indorsed on the writ. The learned judge allowed the application and the defendant appealed to the Divisional Court of the Queen's Bench Division. Two points were raised on appeal:

(1) that the learned judge had no jurisdiction to make the amendment at all; and

(2) that the facts upon which the order was made were not verified by affidavit.

Only point (2) is relevant here. On this point, Cave J, in delivering the judgment of the Divisional Court, held (at p 348):

> In the second place, it is contended that the amendment was made upon a statement of facts which was not verified by affidavit. If the party takes the objection at chambers that the judge has not the proper evidence before him, he cannot make the order; the opposing party is entitled to have the facts upon which the order is founded placed upon affidavit, upon terms as to costs in proper cases. I am, however, not satisfied in the present case that the point was taken before the judge in chambers. The appeal must be dismissed.

It is clear, therefore, that *Holland*'s case did not lay down the legal proposition as stated in the *White Book*.

However, En CC Chan, in fairness to the plaintiff, brought to my attention a passage in the *Malaysian Court Forms in Civil Proceedings* (Malayan Law Journal Sdn Bhd) Vol 4 which appears to support Dato' Mahinder's contention. The passage states (at p 20181 para 20413):

> A supporting affidavit is not usually required but may be necessary if there has been a great delay or there is suspicion of bad faith (see *Conybeare v Lewis* (1881) 44 LT 242).

Upon reading the case cited (*Conybeare v Lewis* (1881) 44 LT 242), with respect, it is my view that the case does not support such a proposition. In this case cited, the plaintiff after the issue of his writ, discovered new facts bearing upon the case. The plaintiff then took out a summons before the chief clerk for leave to amend his writ and statement of claim to include the new facts. The defendants, when before the chief clerk, demanded an affidavit on the part of the plaintiff in support of his summons, and at the request of the chief clerk the plaintiff filed an affidavit. The defendants then cross examined the plaintiff on the affidavit, but the cross-examination was not completed. The plaintiff then applied to the clerk to adjourn the summons into court, but the clerk refused, because the cross-examination was incomplete. The plaintiff then brought a motion for leave to amend the writ and statement of claim. The Master of the Rolls (Jessel MR) held (at p 242):

> Let us consider the circumstances. An application was made by the plaintiff in chambers for leave to amend his writ and statement of claim. That he had a right to do this was clear — the application for leave was merely formal, because matters subsequent to the issue of the writ had arisen. It is not the practice in my chambers to require an affidavit in support of such an application. New facts had been discovered, matters germane to the cause, and therefore proper to be inserted. The solicitors for the defendants required the plaintiff to put in an affidavit in support of his summons, and cross-examined him upon his affidavit, not for the purpose of resisting the application, but of showing that the plaintiff was a dummy put forward by other persons, and that the action was not bona fide. This, in my opinion, was an abuse of cross-examination; an attempt to obtain evidence — in fact, to anticipate the trial.

Thus it will be observed that in the above case an affidavit in support was in fact filed by the applicant/plaintiff and that the issue was not whether an affidavit in support of the application to amend was necessary or not but whether the defendants had the right to cross examine the applicant/plaintiff on his affidavit (which, on the facts, the Master of the Rolls considered an abuse of the process of the court). Jessel MR was not laying down any principle as to the filing of an affidavit in support of an application to amend but was only stating the practice of his court in relation to the filing of affidavits in the circumstances of the case before him. In any case, considering that the above case was decided in 1881 and made no mention of such principle as enunciated in *Yamaha*'s case, it is my view that, in the light of *Yamaha*'s case, the 'practice' of Jessel MR in the late 19th century should now be considered obsolete.

I shall now move on to my second ground. It is this. There has been a long delay in applying for the amendment and the delay has not been accounted for by affidavit evidence. Even if the plaintiff's affidavit (which has been rejected by this court) were admissible, the affidavit, as can be seen, does not give any reason for the long delay. The suit was filed on 28 May 1998 and the case was fixed for trial twice since then. But the application to amend was only filed on 29 May 2000. Thus there has been a delay of about two years. The House of Lords in *Ketteman & Ors v Hansel Properties Ltd* [1988] 1 All ER 38 has issued a warning to litigants in regard to the frequent practice of making late applications for amendments. Lord Griffiths said (at p 62):

> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.

The above passage was cited with approval by our Court of Appeal in *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [1998] 2 MLJ 301.

In my judgment, it is the law that where there has been a long delay in applying for leave to amend a pleading, there must be an affidavit to explain the delay; except in cases where the amendment is plainly and obviously trivial in nature or where the opposite party does not oppose the application. Only if there is an explanation by way of an affidavit will the court be in a position to assess and decide whether in the circumstances leave to amend ought to be granted or not (see *Lembaga Pelabuhan Johor v The Pacific Bank Bhd* [1998] 5 MLJ 323 and *Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359).

Appeal dismissed.

Reported by Benjamin Yong